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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 610

THE FIRESTONE TIRE & RUBBER COMPANY, *Petitioner,*

v.

FEDERAL TRADE COMMISSION.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The Firestone Tire & Rubber Company petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on April 18, 1966.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A, infra A-1-33) is reported at 360 F. 2d 470. The judgment of the Court of Appeals, issued as a man-

date, affirming in part and reversing in part the order of the Federal Trade Commission, was entered April 18, 1966 (Appendix B, infra B-1). The order of the Court of Appeals denying rehearing was entered May 18, 1966 (Appendix C, infra C-1). The order of the Court of Appeals staying the mandate for 90 days was entered May 25, 1966; by order dated August 9, 1966, the stay was extended through October 15, 1966 (Appendix D, infra D-1). The Initial Decision of the Hearing Examiner (R. 201) and the Final Order (R. 221) and Opinion (R. 226) of the Commission dated March 9, 1961 are reported at 58 FTC 371. The Commission on May 26, 1961, entered an order (R. 299) denying motions for modification and stay, 58 FTC 1199.

This Court has heretofore decided a related case *Atlantic Refining Co.* v. *FTC*, 381 U.S. 357, 14 L. ed. 2d 443, 85 S. Ct. 1498, and on January 17, 1966 denied rehearing thereof. In another related case this Court on June 7, 1965 issued a per curiam opinion, *FTC* v. *Texaco*, 381 U.S. 739, 14 L. ed. 2d 714, 85 S. Ct. 1798 as result of which the case is, for the second time, before the United States Court of Appeals for the District of Columbia Circuit; briefing was completed in August of this year, and oral argument will probably be held this fall.

JURISDICTION

On August 1, 1966, Mr. Justice Black entered an order extending the time for filing a petition for a writ of certiorari, to and including September 30, 1966. The jurisdiction of this Court is invoked under 28 USC 1254(1).

QUESTIONS PRESENTED

Whether the Commission erred in ruling that Firestone violated Section 5 of the Federal Trade Commission Act, 66 Stat, 632, 15 USC 45, and must cease the tire company-oil company sales commission plan on tires, batteries, and accessories (T.B.A.). Also, whether the Commission's order, in any event, should be suspended in toto or as to Texaco at least until the *Texaco-Goodrich Case* (supra) is finally adjudicated "in light" of the *Atlantic* decision (supra) by this Court. If the Commission's ruling was correct, a further question is whether this Court should modify the Commission's order unless and until a record showing is made respecting the smaller oil companies under contract with Firestone.

STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, provides, in pertinent part:

> "Unfair methods of competition in commerce, and unfair * * * acts or practices in commerce, are declared unlawful.
>
> * * * * * * * * * *
>
> The Commission is empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair * * * acts or practices in commerce."

STATEMENT

The case involves the legality, under Section 5 of the Federal Trade Commission Act, of a marketing program known as the "Sales Commission Plan" between Firestone, a large rubber company, and Shell, a large oil company (and between Firestone and var-

ious other oil companies, large and small). Under the plan, the T.B.A. line of Firestone is sold to the motoring public through some of the wholesale and retail outlets marketing Shell petroleum products. Firestone, with the assistance of Shell, sells T.B.A. directly to these outlets and for such assistance Shell receives a sales commission from Firestone—a percentage based on recorded net sales.

The Firestone-Shell plan has been continuous since 1940; Shell for many years has had a similar plan, continuously, with The Goodyear Tire & Rubber Company. For many years Shell has operated on this T.B.A. plan only, and has had this plan only with Firestone and Goodyear (R. 238-9, 242). Thus, there is an absence of any sudden or major shift of T.B.A. volume from one marketing plan to another, or to or from any competitors of Firestone or Goodyear. Throughout the years, Shell outlets have not urged or sought a change in plan or sponsored T.B.A. brands and hence there has been no rejection or ignoring of their wishes. Also throughout the years, Shell has sponsored both T.B.A. lines in its entire marketing area and so there has been no territorial allocation of sales effort. (R. 232-3)

The Commission's complaint challenging the legality of the sales commission plan was dismissed as to Firestone by the Hearing Examiner who held the sales commission plan lawful; he recommended only a no-coercion order against Shell. The Commission reversed its Hearing Examiner and held the plan illegal but affirmed the no-coercion order against Shell. The Fifth Circuit affirmed the Commission in outlawing the sales commission plan between Firestone and all oil companies, and between Shell and all rubber com-

panies, basing its ruling on this Court's decision in *Atlantic,* but the Court reversed the Commission's no-coercion order against Shell.

Like the Commission, the Fifth Circuit refused to limit the orders to business transactions between Firestone-Shell, and also refused to stay the effective date of the orders until other pending T.B.A. cases were finally adjudicated.

The *Atlantic-Goodyear* case is the only one that has been finally adjudicated; *Tampco-Goodrich* is now before the District of Columbia Circuit.

As the above suggests, unlike *Atlantic,* there is present here (1) no geographic allocation of T.B.A. market, (2) no sudden shift of large T.B.A. volume to or from other suppliers *accomplished through policing and forcing,* and (3) no basis for a no-coercion order.

REASONS FOR GRANTING THE WRIT

There is no reasonable basis in law for the Commission's order in the instant case because there is no warrant in the record for the Commission's findings. That is the fundamental difference between this case and *Atlantic.* In addition, the Commission erred here because it ignored virtually all defensive evidence. The Fifth Circuit erred because it followed this Court's opinion which was based upon a different record in another case involving different parties. The record as a whole (1) did not permit a coercion finding, (2) showed Shell dealer freedom on T.B.A., and (3) did not show anti-competitive effects.

While this Court in *Atlantic* held that plan illegal, with coercion being conceded, nevertheless, as the Fifth Circuit observed, this Court emphasized the

strong arm tactics employed by Atlantic and was critical of Atlantic's "continuing campaign of force", "coercive pressures", demands, threats and cancellations. These are alternative ways of saying that Atlantic improperly used its "economic power" in petroleum marketing to destroy competition in T.B.A. marketing. In contrast, here the Fifth Circuit reversed the Commission's coercion finding against Shell and the Court said ". . . in no instance was a dealer's lease cancelled or was renewal refused; in no instance was a lease rental increased because of recalcitrance in buying sponsored T.B.A." (Appendix A p. 30) The Court further said it was not impressed by the evidence showing overt coercion and that there was not enough evidence to show a pattern or practice of overt coercion; hence, ". . . we conclude that the record evidence of overt coercion slims to invisibility . . .". The Court also said it was left with ". . . the definite conviction that the record, when taken as a whole, does not support the finding of fact that overt coercion of dealers to buy from sponsored T.B.A. outlets was a prevailing Shell business practice."

The Commission has no case here because Shell dealers retained freedom of choice as to T.B.A. brands. Unlike the showing made in *Atlantic,* the record in this case showed retention of choice and exercise of choice by Shell outlets. *Petitioner submits that this is the crux of the case, i.e., whether or not Shell used or abused its so-called economic power to the point of taking away dealer T.B.A. freedom.* The statistical and other facts in this record show Shell dealer freedom. This Court in *Atlantic* expressly denied making a *per se* ruling and, therefore, the record facts become of utmost importance, and of greater significance than

legal theory. The question is whether there is substantial evidence to support the Commission's specific findings of fact. That question was answered in the affirmative in the *Atlantic* case based on the record facts therein. The opposite conclusion must be reached on the facts in the instant case.

Petitioner cannot agree with the Fifth Circuit that there is a similarity of controlling facts here and in *Atlantic*. Dealer servitude was shown in *Atlantic*, but not shown here. This record does not show exercise of Shell power over dealers; Shell did not force them to buy sponsored T.B.A. either with or without overt coercion.

According to this Court, the Atlantic Refining Company *forced* its dealers to buy and sell sponsored T.B.A. Shell did not, as shown by expert witness MacGowan's statistical exhibit and oral evidence (RX 284, R. 5518, R. 3341-3348, R. 4173-4193) which revealed that about 44% of the Shell outlets under the Firestone plan bought little or no sponsored Firestone T.B.A. In epitomizing its decision, this Court said forcing of Atlantic dealers to buy sponsored T.B.A. was the nub of the case and that this was the element that resulted in the anti-competitive effects found; Shell did not force. Mr. MacGowan had made a current full year study of each of the 8,697 accounts under the Firestone-Shell plan, to ascertain their actual T.B.A. purchasing habits from Firestone's local wholesalers under the sales commission program. This analysis disclosed that 20.1 per cent of the potential buying outlets bought *no* Firestone T.B.A. under the plan, and an additional 23.3 per cent bought only $50 or less per month of Firestone T.B.A. Fifty dollars a month at the time of the study would buy

only two passenger tires (R. 4193). The MacGowan evidence was wholly ignored by the Commission and the Fifth Circuit. Surely, this evidence shows, unlike the record in *Atlantic,* that on T.B.A. the Shell dealer does bargain as an equal with Shell.

One of the strong arm tactics of Atlantic, mentioned by this Court, was Atlantic's complete control over the placement of advertising in the dealers' stations; it permitted no signs or displays other than those of sponsored products. The record facts in the instant case show no control over advertising, but rather the free and frequent use of signs and displays of non-sponsored T.B.A. in Shell outlets. The Fifth Circuit said it could not find that Shell controlled T.B.A. advertising in Shell stations. (Appendix A-19).

In the *Atlantic* case (following a period of almost 20 years on a non sales-commission plan), after Atlantic had been on the sales commission plan only seven months, the sponsored tire company (Goodyear) had signed up virtually every Atlantic dealer in two of the three large marketing areas. There is no such testimony in the present case.

Major emphasis was placed by this Court on the enormous and sudden increase in sponsored T.B.A. through Atlantic stations which the Court said was "the result of the effective policing of the plan". No such finding or conclusion could be made on the facts in this case. The Court pointed out that Atlantic told the dealers if they didn't buy enough sponsored T.B.A. their future was in jeopardy and actually some of them lost their leases for not complying. Shell terminated no one for T.B.A. reasons according to the evidence in this case. (Appendix A-30).

The great success of sponsored sales commission T.B.A., in a matter of months, in the *Atlantic* case impressed the Court especially in view of the fact that surveys showed that 67% of the Atlantic dealers preferred Lee tires and 76% preferred Exide batteries. Shell did not similarly ignore its dealers' wishes.

This Court said that in Atlantic's marketing area where the one tire company was sponsored, the other sponsored company was foreclosed, and vice versa. Shell sponsored both companies throughout its marketing area. (Appendix A-23) In the Atlantic case there was a finding supported by evidence, that competing T.B.A. manufacturers and wholesalers were foreclosed from Atlantic stations, and this Court said that Atlantic outlets were "effectively foreclosed" from selling non-sponsored T.B.A. brands. The facts in the instant case disclose no such foreclosure. Over 100 Shell dealers testified to T.B.A. freedom, and in many cases gave specific testimony regarding their non-sponsored T.B.A. purchases and sources and named the non-sponsored brands. This evidences the fact that neither Shell outlets nor competing wholesalers were foreclosed; and the same testimony was given by competing wholesalers themselves whether called as witnesses for the Commission or the defense. The Commission called eleven wholesale concerns competitive to Firestone and Goodyear; many of them admitted doing a substantial T.B.A. business with Shell stations and all of them did some; the defense called thirteen competing wholesale concerns and their specific testimony was overwhelmingly to the same effect. Manufacturer level injury is a sham in this case but it is highly significant that no competing tire manufacturer, large or small, testified to competitive

injury, unreasonable restraint, or foreclosure; that did not deter the Commission from making a finding of injury to, and foreclosure of, smaller tire manufacturers.

This Court in the *Atlantic* case said that the Atlantic outlets were not free as to T.B.A. brands and that they had to handle sponsored T.B.A. even when it was higher priced than non-sponsored T.B.A. No such evidence is present here.

If this Court should reject all of Petitioner's other contentions, Petitioner submits that it should at least grant the same exception as that granted in *Atlantic* (which the Fifth Circuit did not grant). The Fifth Circuit, in footnote 12, said, "The Supreme Court excepts from its ruling oil companies able to show that they are 'not possessed of economic power over their dealers'." But then the Fifth Circuit added, "The nature and extent of this exception is of course beyond the scope of this opinion." Apparently, the Circuit Court felt that the Supreme Court, not it, should decide whether the exception granted in *Atlantic* should be granted in any other case. Petitioner submits that the Order should be limited unless and until the Commission, based on a record, makes findings and conclusions, like those entered as to Shell, as to smaller oil companies on the sales commission plan with Firestone.

As a final point, Petitioner urges that if the Order is not set aside it should be suspended as to Firestone, or at least suspended as to the Firestone-Texaco relationship, until such time as the *Texaco-Goodrich Case* is adjudicated. Both Firestone and Goodrich have the sales commission plan with Texaco. There would be a manifest injustice if Firestone's competitor, Good-

rich, could continue an identical sales commission plan with Texaco, but Firestone could not.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 29, 1966.